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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	)	Rulemaking 06-04-009 (Filed April 13, 2006)

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of: Order Instituting Informational Proceeding on a Greenhouse Gas Emissions Cap	)	Docket 07-OIIP-01

REPLY COMMENTS OF THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ON THE ADMINISTRATIVE LAW JUDGES' RULING REQUESTING COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE REPORT

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REPLYCOMMENTS OF THE
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ON THE ADMINISTRATIVE LAW JUDGES' RULING REQUESTING COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE REPORT

In accordance with Rules 1.9 and 1.10 of the Rules of Practice and Procedure of the Public Utilities Commission ("CPUC") of the State of California, and in accordance with the "Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on the 'Market Advisory Committee Report and Notice of En Banc Hearing" (the "ALJ Ruling") filed July 19, 2007 in Rulemaking 06-04-009, the Salt River Project Agricultural Improvement and Power District ("SRP") hereby files these Reply Comments ("Comments"). SRP also files these Comments with the California Energy Commission ("CEC") in Docket 07-OIIP-01. In these Comments, the CPUC and CEC will be referred to collectively as the Joint Commissions.

SRP reiterates its view that any mandatory program to reduce green house gas ("GHG") emissions should be national in scope and should include all sectors of the economy that contribute GHG to the atmosphere. SRP also believes that the Joint Commissions should give sufficient consideration to reliability impacts and the impact to market liquidity throughput the rule making process.

SRP's Comments focus on the point of regulation and concerns about the use of E-Tags to identify the source of generation.

POINT OF REGULATION

SRP supports a hybrid system where the point of regulation is (1) any generation located in California and (2) the first entity to buy electricity at a point of delivery within California for use in California ("First Buyer").

Numerous parties commented on the definition of First Seller. Several parties argued that, as it relates to imports, the first seller should be the entity delivering electricity into the state of California. Other parties have suggested that it should be the parties receiving electricity into California. The arguments of both groups have focused on whether either system (1) could accurately identify GHG emissions associated with a specific transaction, (2) would encourage the use of lower GHG emitting generation resources. and (3) may violate the Commerce Clause. SRP believes the First Buyer approach would work best in light of the issues discussed to date.

Identification of Emissions

One of the benefits touted by advocates of the First Seller approach is its alleged superiority for identifying generation sources. SRP believes that a carefully crafted First Buyer approach can provide similar information on the generation resources in most transactions. The parties have generally focused on transactions occurring in the bi-lateral or Independent System Operator ("ISO") market.

Under a First Buyer approach, in a bi-lateral transaction the purchasing entity would have access to same amount of information about the source of the generation that an importing entity would. The ALJ Ruling discusses using E-tags as the source for

information to determine the GHG emissions for a transaction.[1] In a bi-lateral transaction, the buying entity has the same access to the E-tag as would the selling entity.[2]

To the extent there is a problem identifying a generation resource with the First Buyer approach, it would occur in transactions involving the California Independent System Operator ("Cal ISO"). Emissions information can be lost when a transaction occurs through the ISO market. This concern could be resolved by requiring the ISO to develop a refined emissions profile for its transactions.

The ISO has access to the E-tag for transactions occurring in its market. The ISO could use the generator information identified on the E-tags to create a refined emissions profile for its transactions. The emissions profile could then be applied to purchases made through the ISO Market requiring parties to acquire allowances to cover those purchases. This is not dissimilar to the approach used for systems sales from regions when the generator is not identified on the E-tag. It will be more accurate because the ISO would have access to E-tags with the specific generation resources.

Encourage the Use of Low GHG Emitting Resources by California Entities

Under a First Buyer approach, as defined above, California entities are encouraged to select low GHG emitting resources when making purchasing or investment decisions. If the First Buyer is also the point of regulation, the entity would be required to purchase allowances associated with the electricity it purchases. The higher GHG

[1] See ALJ Ruling at 4 and 8.
[2] SRP does not endorse using E-Tags as the only source of information to identify generation. SRP has concerns about such an approach as discussed later in these Comments. SRP merely uses this as a point of illustration since E-Tags appear to represent the Joint Commission's approach at this time.

emitting resources would require more allowances, thereby encouraging entities to purchase from lower emitting resources.

The First Buyer approach accomplishes this without the unintended price impacts to consumers that a First Seller approach would entail. Under the First Seller approach low emitting GHG generation sold through the ISO market would be paid the market clearing price set by higher emitting resources such as coal fired facilities. While the coal plant is penalized with a higher price because of the requirement for the plant to internalize the costs, California consumers will also pay more for the lower emitting resource because of the market clearing price. Under a First Buyer approach the cost of the allowances for coal would still have to be paid by the buying entity raising the price for coal to consumers but the low GHG emitting generation would be cheaper for consumers.

COMMERCE CLAUSE CONSIDERATIONS

The First Seller approach raises significant Commerce Clause issues. The Commerce Clause provides that "Congress shall have Power . . . to regulate Commerce with foreign nations, and among the several States, and with Indian tribes."[3] The "dormant" Commerce Clause refers to the negative implications of the Commerce Clause that prohibits economic protectionism, a restriction prohibiting a state from passing legislation that is designed to benefit in-state economic interests by burdening out-of-state competitors.[4]

[3] U.S. Const., art. I, § 8, cl. 3.
[4] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988).

The U.S. Supreme Court has adopted "what amounts to a two-tiered approach" to determine the validity of a statute that invokes the Dormant Commerce Clause.[5] The first tier is referred to as the "virtual *per se*" rule, which is applied when a statute directly regulates or discriminates against interstate commerce, or when the effect of a statute is to favor in-state economic interests over out-of-state interests.[6] A facially discriminatory statute is subject to "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory measures."[7]

The second tier is reserved for statutes that regulate evenhandedly, but have an indirect effect on interstate commerce.[8] In those instances, the statute will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[9] Thus, the court examines "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."[10]

The United States Supreme Court has also recognized that statutes that have the effect of controlling conduct beyond state boundaries are unconstitutional.[11] Thus, the Supreme Court has stated that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[12] The "critical inquiry is whether the practical effect of

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[5] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578 (1986).
[6] Id.; Alliant Energy Corp. v. Bie, 330 F.3d 904, 911 (7th Cir. 2003); Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978).
[7] Wyoming v. Oklahoma, 502 U.S. 437, 456 (1992).
[8] Brown-Forman Distillers Corp., 476 U.S. at 579; Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[9] Pike, 397 U.S. at 142.
[10] Brown-Forman Distillers Corp., 476 U.S. at 579.
[11] Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality).
[12] Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989); see Edgar, 457 U.S. at 642-43.

the regulation is to control conduct beyond the State."[13] Finally, the "practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States."[14] Applying this theory, courts have struck down laws that burden interstate commerce by imposing environmental conditions on citizens of the state when those same regulations have extraterritorial effects.[15]

SRP is concerned that the First Seller approach could be challenged as discriminatory even though it may be facially neutral. A broad definition of First Seller, sweeping in out-of-state power generators, may have unconstitutional consequences by controlling the conduct of those engaged in commerce occurring wholly outside the state. Similarly, an expansive definition of "point of regulation" that includes out-of-state generators would directly regulate interstate commerce in violation of the Commerce Clause. Therefore, the First Seller approach may have the "practical effect" of regulating out-of-state commerce because of requiring compliance and imposing increased costs on out-of-state generators.

Furthermore, SRP believes that a national program may solve any Commerce Clause concerns. The Ninth Circuit Court of Appeals has held that state-based regulations may disrupt interstate commerce to the extent that state-based rules regulate extraterritorially and produce different standards.[16] For example, in Union Pacific Railroad, the court addressed the issue of railroad safety measures. Under the challenged regulatory system at issue in the case, a train leaving from one state and arriving in

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[13] Healy, 491 U.S. at 336.
[14] Id.
[15] See Nat'l Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652, 657-58 (7th Cir. 1995); Hardage v. Atkins, 619 F.2d 871, 872 (10th Cir. 1980).
[16] See Union Pacific Railroad Co. v. CPUC, 346 F.3d 851 (9th Cir. 2003).

California would have to be configured to meet the most stringent standards on its trip because trains often travel across multiple state lines.[17] The court noted that under such a system, "any rule regarding the make-up of a train will have extra-territorial effects in a number of different states."[18] The court expressed concern that this could direct other states to adopt differing standards, possibly leading to an extensive amount of inconsistent state regulation, which "would undermine the need for substantial uniformity in this area."[19] Ultimately, the court found that the justification of easing the administrative burden of applying the railroads' more technical standards was not enough to validate the burden on interstate commerce, which the court held to be unconstitutional.[20] SRP believes the same justification — the need for uniformity or coordination at a regional, national and international level — exists with respect to the MAC Report's recommendation.

The First Buyer approach avoids many of the Commerce Clause issues by limiting the purview of the regulations to those entities in California. The more expansive the definitions are such as regulating entities located outside of California, the more vulnerable the regulations are to a constitutional challenge. Because the Supreme Court and other federal cases make clear that the Commerce Clause's prohibits against directly regulating out-of-state commerce, SRP believes that such a challenge may be avoided by using a First Buyer based definition and point of regulation for the cap-and-trade program.

[17] Id. at 871.
[18] Id.
[19] Id.
[20] Id.

E-TAGS WILL NOT ALWAYS ACCURATELY IDENTIFY THE SOURCE OF GENERATION

SRP is concerned about the potential reliance some parties seem to be placing on the use of E-tags as the sole source of information to identify the generator. E-tags will not always accurately identify a generator. In certain instances, the source listed in an E-tag may be substituted with another source. For accounting purposes, this is resolved after the transaction occurs but the E-Tag is not updated to reflect the actual generator.

SYSTEM SALES

SRP like other entities offer system sales as an energy product to the market. These sales are not backed by a specific generator. Instead such sales are backed by a generation portfolio. System sales are a superior product because they allow for flexibility and improve reliability. If a specific generator is not available or if a transmission line from a specific generator is not available, the selling entity can still complete the transaction. SRP urges the Joint Commissions to ensure that such sales are not penalized by a high emission factor that is not representative of that generation.

CONCLUSION

SRP appreciates the opportunity to provide these Comments to the CPUC and CEC for your consideration.

Dated: August 15, 2007

Respectfully submitted,

___/s/ Rebecca C. Goldberg_____

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Certificate of Service

I hereby certify that I have on this day served a copy of these **Reply Comments of the Salt River Project Agricultural Improvement and Power District On the Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report** on all known parties to R.06-04-009 by transmitting an e-mail message with the document attached to each party named with an e-mail address in the official service list dated August 13, 2007. Parties without e-mail addresses, Commissioner Michael R. Peevey, Administrative Law Judge Charlotte TerKeurst, Administrative Law Judge Jonathan Lakritz, and Administrative Law Judge Meg Gottstein, were mailed a properly addressed copy by first-class mail with postage prepaid. A copy of the **Reply Comments of the Salt River Project Agricultural Improvement and Power District On the Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report** was also filed with the CEC by transmitting an e-mail message with the document attached to the CEC Docket Office.

Executed on August 15, 2007.

/s/ Rebecca C. Goldberg

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Service Lists

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